Supreme Court, U.S.
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93-990

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MARY HELEN STOKES

Petitioner

v.

DR. KENNETH HATCH, ET. AL.

Respondents

PETITION FOR WRIT FOR CERTIORARI FROM

THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

ORAL ARGUMENT REQUESTED

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QUESTIONS PRESENTED

I. Whether Mary Helen Stoke's due process constitutional rights under the 5th and 14th Amendments to the U.S. Constitution were violated in all courts below when she had a meritorious malpractice case that almost costs her life due to a student doctor using substandard medical procedure at UAB Hospital in Birmingham, Alabama when she developed toxic shock syndrone that caused her to have permanent high blood pressure and pain in her muscles for a lifetime?

II. Whether the new procedural policy of the Supreme Court of Alabama to "Afirmed. no Opinion," policy is a state procedural policy infringing on the constitutional rights of a citizen of the United States to due process in the court especially since the trial court judge had abused his discretion in obeying prodecure in not allowing deposition to be taken according to Rule 56, Rules of Alabama Civil Procedure when

QUESTIONS PRESENTED (CONTINUED)

ruling on summary judgment which was granted in favor of defendants when clearly substandard medical procedure by allowing a student doctor to perform complicated surgery of endometriosis?

TABLE OF CONTENTS

	PAGE
Table of Contents	ii
Questions Presented for Review...	i
Parties to the Proceeding.....	iv
Oral Argument Requested	iv
Citations of Authority	iii
Opinions below	1
Jurisdiction	2
Statement of Case	3
Statement of the Facts	5
Reasons for Writ of Certiorari ..	10
Conclusion	20
Appendix	a-1

CITATIONS OF AUTHORITY

	Page
Celotex Corporation v. Catrett, 477 U.S. ___, 91 L. Ed 2d 265, 106 S Ct, 1986.....	20
Clark v. Alabama Farm Bureau Mutual Casualty Insurance Co., 465 So. 2d 1135 (Ala. Civ. App. 1984, at 1136	18
Jones v. Alabama State Docks, 443 So. 2d 902 at 903, (Ala. 1983)	11
Hightower & Co. v. U.S. Fidelity & Guar., 527 So. 2d 698 at 699 (Ala. 1988)	18
Horwitt v. Horwitt, D.C. Conn. 1950, 90 F. Supp. 529	14
Pruitt v. Elliott, 460 So. 2d 1275, (Ala. 1984)	16
Standard Oil Co. v. Graves, Wash. 1919, 49 S. Ct. 320, 249 U.S. 389, 63 L. Ed.662	13
Velger v. Cawley, 525 F. 2d 334 (2nd Cir. 1975)	12
Other	
Code of Alabama § 6-5-548 (a-c) Medical Liability act of 1987	13,16
Rule 56, Alabama Rules of Civil Procedure	4,9,12 16,19
5th and 14th Amendments to U.S. Constitution	i,7,10

PARTIES TO THE PROCEEDING

The petitioner is Mary Helen Stokes who was Plaintiff and Appellant below.

The respondents are Dr. Kenneth Hatch and Dr. Ronald Alvarez [student doctor at the time in UAB Hospital, Birmingham, Alabama] who were Defendants and Appellees below.

ORAL ARGUMENT REQUESTED

The Petitioner respectively requests that oral argument be allowed because of the complexity of the facts and the law in the instant case, and so that the Honorable Justices can ask questions.

No.

IN THE

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PETITION FOR WRIT FOR CERTIORARI FROM

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OPINIONS BELOW

The Petitioner incorporates all statements which are stated in the Appendix as Opinions Below onto this Writ of Certiorari.

JURISDICTION

Reversal and review is sought from the final decision of the Supreme Court of Alabama, the highest court in state originally denied the appeal with the statement "affirmed. "No opinion". Jurisdiction invoked under 28 U.S.C. § 1254 as Writ.

Constitutional Provisions involved

Amendment XIV of Constitution of the United States provides, in part, as follows:

"... no state shall make or enforce any law which shall ... deprive any person of ... property without due process of law..."

Amendment XIV of the Constitution of the United States further provides, in part, as follows:

"... no state shall make or enforce any law which shall ... deprive any person of ... property without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws."

Also, jurisdiction of this Court is invoked under U.S. Constitution, Amendment V, "no person shall... be deprived of life, liberty or property, without due process of law;"

STATEMENT OF THE CASE

This is a malpractice case where the Defendants provided substandard medical care]Vol. I. p. 182, did not receive post-operative antibiotics] is an endometriosis operation which had to be performed a second time at the same site of the first operation because of failure of Defendants to administer peri-operative antibiotics to prevent development of Staphycoccus aureus, [Vol. V, p. 898, Staphycoccus aureus developed at site of first operation], and

the lack of this preventative antibiotics contributed to the second operation which had to be performed because of development of toxic shock syndrome from substandard surgery and the Defendant had to drain an infected hematoma at the site of the first operation [Vol. V, p. 877]. [Also, see Complaint Vol. I, p. 1-7, which was filed on June 11, 1991.]

On March 11, 1992, Defendant's attorney filed "Motion for Summary Judgment." [Vol. I, p. 138-151]. Exhibit B was only a denial by Dr. Hatch. Dr. Asam was not allowed to take the deposition of Dr. Hatch because the Honorable Judge of the trial court said Plaintiff could not take the deposition of Dr. Hatch at a hearing until ruling on summary judgment which is a violation of Rule 56, Rules of Civil Procedure.

No continuance was allowed which was filed on May 5, 1992 so that an expert witness could be found. [Vol. V, p. 826].

Motion for recusal was filed on May 7, 1992, but denied. [Vol. V, p.828-850].

Summary Judgment granted for Defendants [Vol. V, p. 912].

Motion to Alter, Amend and Vacate Judgment was denied August 12, 1992, and the appeal was timely filed on September 21, 1992.

The Supreme Court of Alabama ruled "Affirmed. No opinion", and overruled the Application for Rehearing on August 27, 1993.

STATEMENT OF THE FACTS

This is a complex malpractice case against Dr. Kenneth Hatch et al. Dr. Hatch was difficult to serve since he moved out of state after the malpractice incident. Dr. Kenneth Hatch was a staff doctor at the University of Alabama Hospitals in Birmingham, Alabama, at the time the Plaintiff, Mary Helen Stokes, received her operation for removal of endometriosis mass. [Vol. I, p. 148]. Dr. Hatch claimed in his affidavit that he assisted Dr. Alvarez [later added as defendant by Amendment, Vol. I, p. 154] when Dr. Alvarez was a student resident doctor - not yet licensed as a surgeon when Dr. Hatch was the

staff doctor. Mrs. Stokes paid for her medical treatment and was not told that Dr. Hatch would not actually completely perform the operation. [See Vol. I, p. 148, where Dr. Hatch stated, "I assisted Dr. Ronald Alvarez in the operation." It is said when a doctor denies any wrong doing [Affidavit Vol. I, p. 147-151] and denies he performed a second operation [Vol. I, p. 153], when an "infected hematoma" was sent to the pathology department, which means a specimen of tissue was removed from Mrs. Stokes in a second operation. See pathology report Vol. V, pp. 888-889 which clearly states on the top of the report "Surgical Pathology..." and "Exam of Tissue, Hematoma, left", and further states on Vol. V, p. 889. The findings are consistent with an abcess." Also, see Vol. V, p. 877, a letter from Dr. Kenneth D. Hatch, to Dr. Timothy Marlow in which Dr. Hatch speaks of "infected hematoma." There would be no "infected hematoma" at the site of the first operation which cuased the toxic shock syndrome in Mrs. Stokes, if the first operation had been

conducted with proper surgical management. [See Affidavit Vol. I, p. 149, that Mrs. Stokes was only given Tylox and Colace, and no mention of any post-operative antibiotics which would have prevented the toxic shock syndrome and febrile condition with sepsis that developed within 48 hours of the first operation and permanently damaged Mrs. Stokes who now has to take hypertension medicine [high blood pressure medicine' which she did not have to take before she developed toxic [Vol. V, p. 908] shock syndrome which almost cost her life when she had pulmonary and renal failure and she had to be transferred back to the UAB Hospital via helicopter, [Vol. V, p. 877].

The threshold issue in this instant case is not the merits of the case which the lower court never heard because of the abuse of due process rights of the Plaintiff to be heard in a court by several ways. [Violation 5th and 14th Amendments to U.S. Constitution due process rights of Plaintiff by trial court and now by

the highest appellate court, The Supreme Court of Alabama, ruling according to new policy "Affirmed. No opinion." which is another form of not providing due process in the appellate court.

In the trial court, first of all the Plaintiff's attorney was not allowed to take the deposition of Dr. Hatch until the summary judgment was to be ruled upon. [See Motion for Recusal, Vol. V, p. 828].

Second, the motion for Continuance was denied when an expert witness prospect may have been found. [Vol. V, p. 826].

Third, the Honorable lower court judge made reversible error by ruling that the Summary Judgment was granted for defendants [Vol. V, p. 909-912].

Fourth, the Motion to Alter, Amend... [Vol. V, p. 851] was judicial error because an expert witness had been found [see Vol. V, p. 857-908, "Amendment to Motion to Alter... and Notice of Filing Affidavit and Documents."]

It was difficult to find an expert witness at first because of the complex malpractice involving complications from child birth involving an endometriosis mass. If the Honorable Judge had allowed the deposition of Dr. Hatch to be taken according to Rule 56, Alabama Rules of Civil Procedure, when there is a Motion for Summary Judgment, it would have been known what type of expert or experts doctors would be necessary. Clearly, there were disputed facts as to whether substandard surgical procedure had been used in the first operation causing the second emergency operation whereby an infected hematoma was removed causing toxic shock syndrome which almost cost the life of the Plaintiff and left her with permanent damages to her both including lifetime pain in her muscles and high blood pressure which she did not have before the toxic shock syndrome.

REASONS FOR WRIT OF CERTIORARI

Questions I and II are discussed together since the bottom line is lack of due process in the trial court and the appellate court.

THE PLAINTIFF'S RIGHTS TO DUE PROCESS IN THE TRAIL COURT UNDER THE 5TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION WERE VIOLATED BY THE LOWER TRIAL COURT WHO RULED INCORRECTLY AND MADE REVERSIBLE ERROR ON ALL DISPOSITIVE MOTIONS AND ALWAYS RULED FOR THE DEFENDANT, AND IN THE APPELLATE COURT, THE SUPREME COURT OF ALABAMA, WERE VIOLATED WHEN THE APPELLATE COURT RULED "AFFIRMED. NO OPINION." NEW POLICY OF STATE PROCEDURE INFRINGING ON THE CONSTITUTIONAL RIGHTS OF A CITIZEN OF THE UNITED STATES TO DUE PROCESS IN THE APPELLATE COURT.

The threshold issue is clearly concerned whether the Plaintiff had due process rights under the 5th and 14th Amendments to the U.S. Constitution to have her case properly heard in the trial court court and appellant court. Both of

the issues listed are being discussed together since all relate to whether Plaintiff received the proper due process in any court as to her complex malpractice case. There is no doubt about it that the Plaintiff developed toxic shock syndrome v. sepsis as a direct result of the first operation of Dr. Hatch and Dr. Alvarez, failing to properly manage the PLaintiff's surgery since no peri-operative antibiotics were used and an "infected hematoma" developed within 48 hours causing toxic shock syndrome which caused both pulmonary and renal failure and caused permanent damage by causing hypertension [high blood pressure] to develop where the Plaintiff has to continue to take hypertensive drugs and pain pills because of pain in her muscles to live.

See Jones v. Alabama State Docks, 443 So. 2d 902 at 903, (Ala. 1983), which states,

"Due process clause of State Constitution secures every citizen against arbitrary action of those in authority and places him or her within protection of law of the land. Const. § 13."

See Velger v. Cawley, 525 F. 2d 334 (2nd Cir. 1975) on due process.

The fact that the Honorable lower court judge did not recuse himself when the judge did not allow the Plaintiff's attorney to take the deposition of Dr. Hatch according to Rule 56, Alabama Rules of Civil Procedure, is clearly a violation of the plaintiff's right to due process under the 5th and 14th Amendments to the U. S. Constitution, and is an abuse of the discretion of the judge to recuse himself when he has made a gross procedural error in the court. Because of the complexity of this malpractice case, the obvious right thing to do he should have allowed plaintiff's attorney to take the deposition of Dr. Hatch, to determine what type of expert witness as a doctor would be necessary for this type of malpractice case in which Dr. Hatch had to perform a second operation to correct the error of causing an "infected hematoma" in the first operaiton due to surgical poor management by not providing post-operative antibiotics,

and by having the student resident doctor to perform the complex operation which should have been performed by the staff doctor completely by Dr. Hatch.

Clearly, the lower court judge should have continued the case for at least 14 days when a possible expert witness had been found who was an M.D. The point is whether the current expert witness rules found in the state law concerning medical malpractice are impinging on on the constitutional rights of due process in the courts as in this instant case when the trial judged abused his discretion by not continuing the case when he was to rule on summary judgment when there were clearly disputed facts. [See Code of Alabama, § 6-5-548 (a-c) imposed by the Medical Liability Act of 1987].

See Standard Oil Co. v. Graves, Wash. 1919, 49 S. Ct. 320, 249 U.S. 389, 63 L. Ed. 662, which states,

"While the Supreme Court follows the decision of the highest state court as to the meaning of a state statute which asserted to violated the Federal constitution, the name given to the statute is not conclusive, and it must be judged by its necessary effect, and if that is to violate the Constitution of the United States the law must be declared void. Emphasis added.

See Horwitt v. Horwitt, D.C., Conn. 1950, 90 F. Supp. 529,

"United States Supreme Court may review directly the decision of the highest state courts on the constitutionality, under the Federal Constitution, of state statutes."

In this particular case it was not known from the beginning that Dr. Hatch assisted a resident doctor [student doctor in surgery] when Dr. Hatch was paid the full amount for his surgical services. Therefore, it is a question as to what type of expert witness was needed. The Plaintiff's attorney thoroughly researched this instant case in the medical library

in the UAB Medical Library because she has a Ph.D. in physiology, and because the judge would not allow her time by denying her Motion to Continue, she did state the facts showing the case had merits. There was doubt about it that there were disputed facts as to whether malpractice had been committed by Dr. Hatch and his student doctor Dr. Alvarez.

The trial court judge ignored the real expert witness Dr. Timothy Marlow who signed an affidavit [Vol. V, pp. 858-908] before the Honorable Judge ruled on the final motion in the court, and the judge made reversible error and the instant case should be reversed and remanded for jury trial for failure of the trial judge to follow the law in Alabama on Summary Judgment and failure of the Supreme Court of Alabama to rule according to their own law on summary judgment and going by a new policyof ruling in the Supreme Court of Alabama which consists of "Affirmed. No Opinion" so that nobody knows exactly why the case was not reversed and remanded.

The elements of summary judgment are found in the following Alabama two cases:

See Booth v. United Services Auto Association, 469 So. 2d 1281 (Ala. 1985), which states,

"To grant summary judgment, trial court must find that there is no genuine issue of material fact and that movant is entitled to judgment as matter of law. Rules Civ. Proc., Rule 56."

Also see Pruitt v. Elliott, 460 So. 2d 1275, (Ala. 1984), which states,

"Summary judgment is proper when there is no genuine issue of material fact and moving part is entitled to judgment as matter of law; all reasonable doubts concerning existence of genuine issue of fact must be resolved against moving party. Rules Civ. Proc. Rule 56 (c)."

Clearly, this instant case is challenging the current medical liability law cited above, p. 13 in Alabama about expert witness and in the instant case there is still what type of expert witness

was necessary since Dr. Hatch did not do what he was paid to do the surgery, but had his student, Dr. Alvarez, to perform the surgery, and Dr. Hatch assisted as Dr. Hatch claimed in his affidavit filed later in the case concerning summary judgment. As the expert witness law now stands a doctor can bury his mistakes and substandard medical care at the expense of justice to the victim patient. Therefore, the expert witness law in Alabama should be re-written as to not cause the constitutional rights of the patient [plaintiff] to be violated when there is a question of whether an expert witness law had been followed. Also when an expert witness had been found before 30 days after a ruling on summary judgment, the Honorable lower court judge made reversible error by not reversing his ruling on summary judgment and allowing the instant case to go to the jury. See again the case cited above, Standard Oil Co., v. Graves, supra, which states "if that is to violate the Constitution of the United States the law must be declared void."

In the instant case, expert witness law cited above concerning medical liability, when misinterpreted in the state highest court is not suppose to violate the due process rights of the Plaintiff under the 5th and 14th Amendment to the U.S. Constitution. However, with the new state policy in the Supreme Court of Alabama to rule "Affirmed. No Opinion," the instant case should be reversed and remanded for a jury trial of all triable issues, since no one knows what a court is doing when receive a notice of "No opinion." or whether the case was even heard by any justice.

See Hightower & Co. v. U.S. Fidelity & Guar., 527 So. 2d 698, at 699 (Ala. 1988), which states,

> "Granting Summary Judgment is nondiscretionary function of trial court, and no presumption of correctness attaches to such decision upon appellate review. Rules Civ. Proc., Rule 56 (c)."

See Clark v. Alabama Farm Bureau Mutual Casualty Insurance Co., 465 So. 2d 1135 (Ala. Civ. App. 1984, at 1136 which states,

"Party moving for summary judgment must show that under no discerniable set of circumstances could other party recover and that there is an absence of genuine issue as to any material fact. Rules Civ. Proc., Rule 56 (e)."

Mr. Norman, attorney for defendant, failed to show that "under no discernible set of circumstances could other party recover because there are clearly disputable facts. By Dr. Hatch in his affidavit just denying he did not act in a substandard way in the operation is not good enough when Dr. Hatch had a student resident doctor operating on Mrs. Stokes and the student doctor failed to use any peri-operational antibiotics which would have prevented the development of toxic shock syndrome in Mrs. Stokes. Mrs. Stokes was permanently damaged by Dr. Hatch only assisting and allowing the inexperience student doctor to operate when the operation was the removal of endometriotic mass.

The point is that the Honorable Judge blocked discovery in this instant case by not allowing the deposition of Dr. Hatch.

See Celotex Corporation v. Catrett, 477 U.S.__ 91 L. Ed 2d 265, 106 S Ct., 1986, which states,

> "In our view, the plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial."Id.at 273.

This Writ of Certiorari should be granted and the petitioner allowed to write a Merits Brief so that the instant case can be reversed and remanded for a jury trial of all triable issues.

CONCLUSION

Clearly, the Plaintiff's due process rights under the 5th and 14th Amendments to the U.S. Constitution were violated when rules of discovery are ignored and the Defendant was unable to show any proof of any fact showing that a summary judgment should be granted, and the Plaintiff was not shown any due process in any court.

As a matter of law the instant case the Writ of Certiorari should be granted, and a Merits Brief allowed to be written and the instant case reversed and remanded for a jury trial of all triable issues.

Respectively submitted,

Julia Asam

11/26/93
Dated

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APPENDIX A

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALA.

MARY HELEN STOKES

Plaintiff

v. CV 91-4518

DR. KENNETH D. HATCH et al.

Defendant

ORDER

Defendant's Motion for Summary Judgment (having been previously continued at plaintiff's requests), [also continued at judge's requests since he was in hospital], came on to be heard this date. [Hon. Judge refused to continue on hearing for summary judgment when had opportunity to hire M.D.,J.D. as co-counsel and motion was before him]. Also considered by this Court are the plaintiff's Motion for Summary Judgment, plaintiff's Motion to Continue Summary Judgment Hearing, and Motion for Recusal. [because judge would not allow the deposition of Dr. Hatch to be taken before ruling on summary judgment].

This Court had reviewed all submitted materials prior to this hearing.

After almost one year from the date of filing of the Complaint, plaintiff seeks a continuance so as to attempt to obtain expert testimony to support her Complaint and to oppose Summary Judgment. [Had a M.D.,J.D. who wished to associate with the case and not allowed by judge, and this M.D.,J.D. was to obtain an expert]. [this M.D.,J.D. was not found until almost time for the summary judgment hearing but the Hon. Judge would not allow continuance].

It is noteworthy that plaintiff's counsel, under a slightly different name, has executed affidavit proof, [research from the medical library at UAB Hospital, Birmingham by Ph.D. in physiological oncological research since Julia Asam is a Ph.D., J.D. was submitted showing the merits until an M.D. expert could be found which was found before the hearing a M.D.,J.D., who was not allowed to associate since he needed two

weeks because of his schedule to study the case and come into the case] in her posture as a medical liability expert. Having read the affidavit of plaintiff counsel/expert, it is noteworthy that articles authored by plaintiff counsel/expert, are some 30 years of age, [in the field of oncological research and one book was written in 1976 - the years were not important since counsel later studied law after her cancer laboratory was stolen] and that the speciality or credentials of plaintiff counsel/expert are ostensibly in a specialty rather distinct from that of the defendant (obstetrics-surgery). [who was also in oncological surgery since endometriosis mass was removed from Plaintiff and there was a question as to what type of expert was to be used, and the Hon. Judge did not allow deposition of Dr. Hatch which was requested by Notice of Deposition on March 12, 1992 at which time exactly what type of expert could have been determined and was the

reason for Motion for Recusal and the Hon. Judge refused to get off the case].

May 8, 1992.

s/ W.J. Wynn, Circuit Judge

APPENDIX B

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALA.

MARY HELEN STOKES

Plaintiff

v. CV 91-4518

DR. KENNETH D. HATCH

Defendant

ORDER

Plaintiff's Amendment to Motion to Alter... and Notice of Filing Affidavit and Documents came on to be heard on August 5, 1992. After review of documents submitted by plaintiff and consideration of oral arguments and brief, this Court finds not a scintilla of evidence law or issues of fact which would allow it to grant plantiff's motion. Wherefore, motion

Denied. [the medical record indicated that there was a second operation and the plaintiff almost died of toxic shock syndrome which was ignored by the court]. This Court's Order of 5-8-92 remains intact.

August 12, 1992.

s/ W.J. Wynn

Circuit Judge

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

Case no. 1911969

Mary Helen Stokes

Appellant

v.

Dr. Kenneth Hatch et al.

Appellees

Appeal from Circuit Court of Jefferson County, Alabama CV 91-4518

Affirmed. No Opinion. February 26, 1993.

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

Case no. 1911969

Mary Helen Stokes

Appellant

v.

Dr. Kenneth Hatch et al.

Appellees

Application for rehearing overruled. No opinion written on rehearing.

August 27, 1993.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of this Writ... was sent to Mr. Robert Norman, Attorney At Law, 1800 City Federal Bldg., Birmingham, Alabama 35203 this 26 day of November 1993.

Julia Asam